

**IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

DISTRICT OF COLUMBIA,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

CIVIL ACTION NO.: 2018 CA 008715 B
Judge Fern Flanagan Saddler
Next Court Date: None Scheduled
Event: N/A

DECLARATION OF JOSHUA S. LIPSHUTZ

I, Joshua S. Lipshutz, declare as follows under penalty of perjury:

1. I am a partner at the law firm of Gibson, Dunn & Crutcher. I maintain my law practice at 1050 Connecticut Ave. NW, Washington, D.C. 20036. I have personal knowledge of the facts set forth in this declaration and, if called to testify, I could and would competently testify to them.

2. Attached as **Exhibit 1** is a true and accurate copy of excerpts of the hearing on the motion to dismiss in *District of Columbia v. Facebook, Inc.*, No. 2018 CA 008715 B (D.C. Super. Ct. Mar. 22, 2019).

3. Attached as **Exhibit 2** is a true and accurate copy of excerpts of the hearing on the motion to remand in *In re Facebook, Inc. Consumer Privacy User Profile Litig.* and *People of the State of Illinois v. Facebook, Inc.*, Nos. 3:18-md-02843 and 3:18-cv-06486 (N.D. Cal. Dec. 6, 2018).

4. Attached as **Exhibit 3** is a true and accurate copy of a Transfer Order in *In re: Facebook, Inc., Consumer Privacy Litig.*, MDL No. 2843 (filed Oct. 5, 2018).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 5, 2019.

By: /s/ Joshua S. Lipshutz

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Exhibit 1

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

- - - - - x
:
DISTRICT OF COLUMBIA, : Docket Number: 2018 CAB 008715
Plaintiff, :
: :
vs. :
: :
FACEBOOK, INC., :
Defendant. :
: Friday, March 22, 2019
- - - - - x Washington, D.C.

The above-entitled action came on for a hearing before the Honorable FERN FLANAGAN SADDLER, Associate Judge, in Courtroom Number 100.

APPEARANCES:

On Behalf of the Plaintiff:

JIMMY R. ROCK, Esquire
BENJAMIN WISEMAN, Esquire
RANDOLPH CHET, Esquire
Washington, D.C.

On Behalf of the Defendant:

JOSHUA LIPSHUTZ, Esquire
CHRIS LEACH, Esquire
Washington, D.C.

19-01446

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1 surprise, here's the grounds for jurisdiction, and that's
2 not -- that's not the way the pleadings work.

3 Now, interestingly, here in this case the
4 District, which is very unusual in a typical case, the
5 District here has had -- has had a full year of discovery
6 before filing its complaint, and Facebook gave the
7 District as part of that discovery 130,000 pages of
8 documents to review in connection with this matter, and
9 out of those 130,000 pages of documents, the District has
10 selected one document that it thinks is all it needs to
11 support jurisdiction in this case, and, frankly, all it
12 has to support jurisdiction in this case. And that's even
13 if you're willing to look at documents attached to its
14 opposition brief, which I don't think this Court should
15 do.

16 But if Your Honor looks at that one document
17 that the District is relying on to support jurisdiction,
18 Your Honor will see that it doesn't support jurisdiction
19 in this case. In fact, the date range of the document
20 that they submit is from September 2015 through December
21 of 2015, and it goes on a little bit into 2016, but, in
22 fact, the conduct that's being alleged as causing the harm
23 in this case took place from 2013 to May of 2015, and
24 that's alleged in paragraph 29 and 30 of the complaint.

25 September 2013 through May of 2015, that's when

1 the data sharing allegedly took place, the data sharing
2 between Facebook and Dr. Cogan, and Dr. Cogan then took
3 that data and gave it improperly to Cambridge Analytica.

4 THE COURT: 2013 to?

5 MR. LIPSHUTZ: To May of 2015 is what's alleged
6 in the complaint. It's actually April, but it's alleged
7 in the complaint.

8 And the document that they put forward as
9 supporting jurisdiction for claims arising out of that
10 incident, the data sharing with Cambridge Analytica,
11 doesn't even start until September of 2015. It's a
12 conversation that takes place between a number of Facebook
13 employees located all over the country, and they are
14 discussing a number of issues.

15 They are discussing -- they do mention Cambridge
16 Analytica in the discussion, so they are discussing
17 Cambridge Analytica, and there is a discussion -- there's
18 a date on December 11th of 2015, there was a news article
19 that came out that revealed the data sharing that had
20 taken place already earlier in 2015, and in that document
21 the Facebook employees are reacting to that news story,
22 just like much of the public reacted to that news story.
23 And they're discussing, you know, the incident that was
24 discussed in the newspaper.

25 But that's not -- that discussion about the

1 events, just because a bunch of employees are discussing
2 the events, that's not enough to give jurisdiction over
3 Facebook for this case because, again, in order for there
4 to be specific jurisdiction, the U.S. Supreme Court has
5 said that the claims need to arise out of the conduct that
6 took place in the District.

7 And, certainly the claims that they have as a
8 result of the data sharing that had already finished by
9 that point, do not arise out of a conversation that took
10 place among a group of employees after the data sharing
11 had already completed.

12 So that's the jurisdictional argument. I'm
13 happy to maybe save some of my time and see what the
14 District puts forward on jurisdiction, and maybe come back
15 to it if there are things that need to be said, but, I
16 think, the jurisdictional argument here is quite clear.

17 The case law, as Your Honor has seen on slides
18 one and two, I think is very clear that this is exactly
19 the type of case where there is not simply enough to
20 connect Facebook's conduct to this District, at least not
21 the conduct that gives rise to the claims at issue in this
22 complaint, and certainly there is nothing in the
23 District's complaint that would support jurisdiction.

24 So let me move on now, just keeping -- I want to
25 keep the time in mind.

1 that information, of course, but do they have complete
2 control over it? No, they don't because he's not part of
3 Facebook.

4 And, so, that's all explained to users as well,
5 and it warns users be careful what you share because that
6 -- what you share can be reshared.

7 So we think the disclosures are clear, and they
8 cover exactly what the District is complaining about, but
9 you don't have to take my word for it. If you go to slide
10 seven, you will see that other courts have agreed with us.

11 On the top I have a quote from the Ninth
12 Circuit, this is just an earlier -- late 2018, December
13 2018, they issued an opinion in the Ninth Circuit, that
14 explained that Facebook's terms and policies contain
15 numerous disclosures related to information, collection on
16 third party websites, a reasonable person viewing those
17 disclosures would understand.

18 In that case it was slightly different practices
19 at issue, but same general contract, the Statement of
20 Rights and Responsibilities, the data use policy, the same
21 contracts that are at issue here, and they held that the
22 case should be dismissed because knowing authorization of
23 the practice constitutes plaintiff's consent.

24 And even more recently the Northern District of
25 California in the quote that you see on the bottom there,

1 in the MDL, the federal multi-district litigation that's
2 taken place on the same set of facts on the Cambridge
3 Analytica events, the judge there in a motion to dismiss
4 hearing said essentially the same thing. He said if you
5 read the words of these contracts, you come away knowing
6 that even if you limit your settings so that you're
7 sharing only with your friends, these third party apps can
8 communicate with your friends, and get all of the
9 information that your friends have access to.

10 All of that seems to be disclosed, he said. And
11 then after saying that, he gave the plaintiffs a final
12 opportunity to amend their complaint, and try and salvage
13 their case.

14 So those are our two grounds for dismissal. We
15 think both of them are clear on the law, as well as the
16 face of the complaint.

17 We've also asked Your Honor in the alternative
18 to stay this case --

19 THE COURT: Right.

20 MR. LIPSHUTZ: -- pending the MDL, and, also
21 pending a related ongoing investigation at the FTC. Both
22 of those cover the same issues that are at stake here.

23 The MDL is in federal court, it's been going on
24 for over a year already. This case is much newer than
25 that case, and DDC, and the D.C. Circuit have said that

1 that Facebook is licensed to do business in the District
2 is not really the relevant inquiry here.

3 Did Your Honor have a question?

4 THE COURT: No, I understood that a hundred
5 percent.

6 MR. LIPSHUTZ: Slide five, again, talks about
7 general Facebook facts, how many consumers are in the
8 District, how much revenue comes from the District.

9 Again, that is -- you could have a slide like this for
10 every state in the country. The numbers, I can assure
11 you, would be higher than they are here. There are more
12 New York users than D.C. users. It doesn't matter for
13 jurisdiction purposes.

14 Slide six was the slide -- I'm sorry.

15 THE COURT: No, go ahead.

16 MR. LIPSHUTZ: Slide six is the slide where they
17 point to this document, and I just want to point out,
18 again, is there a mention of Cambridge Analytica in the
19 document? Sure, there is. This was a conversation taking
20 place between Facebook employees in California, as well as
21 Facebook employees in D.C.

22 But you can see from the language of what's
23 excerpted here, and I want to be mindful of the fact the
24 document is currently under seal, but there's a phrase,
25 and this phrase -- this phrase is one that's been reported

1 in the press, but there's a phrase here that says data
2 scraping. The document is talking about data scraping.

3 Data scraping, respectfully, is not what this
4 case is about. You won't find the phrase data scraping in
5 the complaint. This was a separate incident that does not
6 relate to the allegations of the complaint.

7 Slide seven was -- they were trying to say that
8 our case is where Facebook cases were thrown out for lack
9 of a personal jurisdiction didn't have certain attributes,
10 but the reality is no evidence of targeted ad revenue over
11 \$10 million.

12 Of course there's more ad revenue than \$10
13 million coming out of Illinois, or the State of
14 Washington, so this is, I think, just a misleading slide.
15 And, again, these facts don't relate to the claims arising
16 out of -- the claims that are at issue in this complaint.

17 The last thing I would point Your Honor to is --
18 oh, I'm sorry, two more points. On slide ten, Your Honor,
19 there is a note here, and we heard counsel say that
20 Facebook is only relying on disclosures that were
21 effective from 2013 to January of 2015. That's actually
22 not true.

23 If Your Honor looks at the Duffy declaration
24 that we submitted, paragraphs 8, 13, 14, and 15, all talk
25 about the more updated versions of those same contracts

Exhibit 2

Pages 1 - 51

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE VINCE CHHABRIA, JUDGE

IN RE FACEBOOK, INC. CONSUMER)
PRIVACY USER PROFILE LITIGATION.) NO. 3:18-md-02843-VC

)
PEOPLE OF THE STATE OF ILLINOIS)
ex rel. KIMBERLY M. FOXX,)
State's Attorney of Cook County,)
Illinois,)
Plaintiff,)
v.) NO. 3:18-cv-06486-VC
)
FACEBOOK, INC., et al.,)
Defendants.) San Francisco, California
) Thursday, December 6, 2018

TRANSCRIPT OF OFFICIAL ELECTRONIC SOUND RECORDING
OF PROCEEDINGS

FTR 10:29 a.m. - 11:31 a.m. = 62 minutes

APPEARANCES:

For Plaintiff People of the State of Illinois ex rel. Kimberly M. Foxx:

Edelson, PC
350 North La Salle, 14th floor
Chicago, Illinois 60654
BY: J. ELI WADE-SCOTT, ESQ.

(Appearances continued on following page.)

Transcribed by: Leo T. Mankiewicz, Transcriber
leomank@gmail.com (415) 722-7045

1 Anyway, we can agree to put that issue aside, but
2 I think it does raise questions as to whether this is really
3 the State's lawsuit.

4 And we know that this isn't the State's lawsuit also
5 because we know the Illinois Attorney General is still engaged
6 in communications and investigation on this very issue and has
7 not yet made a determination as to whether to bring a lawsuit.

8 **THE COURT:** Let me ask you, you mentioned the
9 Avandia MDL and you said that it's been certified. So I gather
10 it's pending in front of the Third Circuit now?

11 **MR. LIPSHUTZ:** You know, I don't know whether the
12 Third Circuit granted the 1292 or not. We don't know the
13 answer to that, but if they did, then it would presumably still
14 be pending there, Avandia.

15 And look, the reality is --

16 **THE COURT:** And what --

17 **MR. LIPSHUTZ:** I'm sorry, your Honor.

18 **THE COURT:** Oh, I'm sorry, I just want to make sure
19 I don't forget to ask this question of you.

20 Have you found any other MDLs where this has come
21 up? Because it's not uncommon -- I was going to go down the
22 hall and ask Judge Breyer if they came up in the Volkswagen
23 case. I haven't done that yet, but it strikes me that it is
24 probably not uncommon for a local jurisdiction to file a
25 lawsuit against a defendant who's been pulled into a federal

1 MDL.

2 **MR. LIPSHUTZ:** That's right, and it's also not
3 uncommon for those cases to end up in the MDL, and that was --

4 **THE COURT:** So what are some other examples of that?

5 **MR. LIPSHUTZ:** I think the Volkswagen one did have
6 one. I think there was an Apple one --

7 **MR. WADE-SCOTT:** Not with a fight on remand, just
8 to clarify.

9 **THE COURT:** What?

10 **MR. WADE-SCOTT:** Not with a fight on remand.

11 **THE COURT:** Just, they ended up there.

12 **MR. WADE-SCOTT:** They're in the MDL, so --

13 **THE COURT:** That is at least of some marginal
14 relevance, I suppose.

15 **MR. LIPSHUTZ:** Right. No, not -- the fight over
16 remand was in Avandia.

17 **THE COURT:** Yeah.

18 **MR. LIPSHUTZ:** And the local enforcement agency, the
19 County of Santa Clara, lost that fight.

20 **THE COURT:** So far.

21 **MR. LIPSHUTZ:** So far, that's right. There are
22 other circumstances -- and we can send a supplemental letter if
23 your Honor would like, but I've seen other circumstances,
24 I think there was an Apple one, I think there was a Volkswagen
25 one, where there were local enforcement actions. We have

1 briefing on this in one of our earlier briefs in this case, but
2 I'll find it for your Honor.

3 **THE COURT:** One of your 5,000 briefs that you've
4 filed in this case.

5 **MR. LIPSHUTZ:** One of our 5,000 -- yes, your Honor,
6 where local enforcement actions wind up in the MDL, and they
7 stay there.

8 And if you think about it, it makes a lot of sense.
9 A State Attorney General action cannot end up in a federal MDL,
10 because it's unquestionably not removable, right? A state --

11 **THE COURT:** I think there was some -- in the
12 Volkswagen MDL, I think there were some State Attorney General
13 actions.

14 **MR. LIPSHUTZ:** Well, I guess it's possible --
15 I guess if the State Attorney General is, to my opposing
16 counsel's point, is bringing the action specifically to achieve
17 restitution on behalf of somebody, some individual, maybe my
18 statement is too broad, but in most circumstances, a State
19 Attorney General action would not be removable, and therefore,
20 would not find its way into an MDL.

21 But think about how many local jurisdictions there
22 are all over the country. If you had every local jurisdiction
23 with the ability to bring a state court action on the same
24 facts that are subject to the MDL and there was no mechanism
25 for getting all those actions into federal court and over to

1 the MDL, that alone would significantly undermine the whole
2 purpose of the MDL. I mean, these are the same facts, the same
3 claims, and they could be pending in hundreds of local
4 jurisdictions around the country, based on my opposing
5 counsel's reading of removal law.

6 Now, that may not be --

7 **THE COURT:** I mean, the idea of undermining the
8 purposes of the MDL, the purpose of the MDL is to get all the
9 federal cases decided by one federal court. It's not to get
10 all cases filed throughout the country in front of one federal
11 court. And MDLs -- all kinds of MDLs we have, we have the
12 federal MDL and then we have ongoing state court cases.
13 I mean, my other MDL is the Monsanto case --

14 **MR. LIPSHUTZ:** Right.

15 **THE COURT:** -- where just across the street in state
16 court there was, like, a 260 gazillion dollar verdict against
17 Monsanto.

18 **MR. LIPSHUTZ:** Fair enough. It doesn't solve the
19 problem, and there's --

20 **THE COURT:** And there's nothing wrong with that.

21 **MR. LIPSHUTZ:** And there's nothing wrong with that,
22 but whereas here, it is a local --

23 **THE COURT:** And I mean, I'm not saying there's
24 nothing wrong with -- I'm not taking the position either way on
25 whether there's anything wrong with the verdict. All I -- for

Exhibit 3

**UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION**

**IN RE: FACEBOOK, INC., CONSUMER
PRIVACY USER PROFILE LITIGATION**

MDL No. 2843

TRANSFER ORDER

Before the Panel:* Plaintiff in the action listed on Schedule A (*People of Illinois*) moves under Panel Rule 7.1 to vacate our order conditionally transferring the action to MDL No. 2843. Defendant Facebook, Inc., opposes the motion.

After considering all arguments, we find this action involves common questions of fact with the actions previously transferred to MDL No. 2843, and that transfer under 28 U.S.C. § 1407 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. The actions in MDL No. 2843 arise out of allegations that Cambridge Analytica and other defendants exploited Facebook's platform to obtain user data, and that Facebook should have imposed more robust controls on the use of data by third party applications to prevent this conduct. *See In re: Facebook, Inc., Consumer Privacy User Profile Litig.*, MDL No. 2843, __ F. Supp. 3d __, 2018 WL 3014953, ECF No. 140 (J.P.M.L. Jun. 6, 2018). Plaintiff does not dispute that this action shares factual questions with the MDL No. 2843 actions. The *People of Illinois* action involves allegations, similar to those in the MDL No. 2843 actions, that Cambridge Analytica improperly gathered the personal data of Facebook users using the app "thisisyoursdigittallife," and that Facebook allowed and encouraged this kind of data collection.

Plaintiff argues, *inter alia*, that (1) *People of Illinois* is unique because it is a government enforcement action; (2) the MDL No. 2843 consumer actions will involve issues not relevant to *People of Illinois*, including standing, damages suffered by plaintiffs, and class certification; (3) transfer will impinge on the state's sovereign prerogative to select who represents it and, therefore, *People of Illinois* will require a separate track and relief from case management orders, which will be inefficient; and (4) the Panel should delay transfer to allow the transferor court to rule on the pending motion for remand to state court.

The Panel routinely transfers actions brought by states which enjoy certain sovereign defenses in our federal system.¹ And the Panel recently has rejected the argument that a sovereign

* Judge Charles R. Breyer and Judge Ellen Segal Huvelle took no part in the decision of this matter.

¹ See, e.g., Transfer Order at 1-2, *In re: Auto Body Shop Antitrust Litig.*, MDL No. 2557 (continued...)

entity should not be subject to Section 1407 transfer so that it can retain control over its counsel. *See* Transfer Order, MDL No. 2804, ECF No. 1134 at p. 2 (J.P.M.L. Apr. 5, 2018) (“Plaintiff’s counsel can ask to join the MDL leadership and, of course, plaintiff may keep its own lawyers throughout the proceeding.”).

Section 1407 transfer “does not require a complete identity of common factual issues or parties as a prerequisite to transfer, and the presence of . . . differing legal theories is not significant where, as here, the actions still arise from a common factual core.” *In re: Auto Body Shop Antitrust Litig.*, 37 F. Supp. 3d 1388, 1390 (J.P.M.L. 2014). Though there may be some legal issues that are unique to this action, discovery between this action and the consumer class actions will overlap significantly. We therefore are persuaded that inclusion of this action will result in efficiencies. The transferee judge can accommodate any unique interests that may arise because *People of Illinois* is a government enforcement action. While it might inconvenience some parties, transfer of a particular action often is necessary to further the expeditious resolution of the litigation taken as a whole. *See, e.g., In re: IntraMTA Switched Access Charges Litig.*, 67 F. Supp. 3d 1378, 1380 (J.P.M.L. 2014). Moreover, if the transferee judge determines that *People of Illinois* is best excluded from centralized proceedings, procedures are available whereby this may be accomplished with a minimum of delay. *See* Panel Rules 10.1-10.3.

We will not delay a ruling on the motion to vacate to allow the transferor judge to rule on the pending motion for remand. Jurisdictional issues do not present an impediment to transfer, as plaintiff can present these arguments to the transferee judge.² *See, e.g., In re: Prudential Ins. Co. of Am. Sales Practices Litig.*, 170 F. Supp. 2d 1346, 1347-48 (J.P.M.L. 2001).

¹(...continued)

(J.P.M.L. Dec. 12, 2014), ECF No. 306 (transferring enforcement action brought by the State of Louisiana to MDL involving private antitrust actions alleging industry-wide conduct to suppress reimbursement rates for automobile collision repair shops); Transfer Order at 1-2, *In re: Fresenius GranuFlo/NaturaLyte Dialysate Prods. Liab. Litig.*, MDL No. 2428, at 1-2 (J.P.M.L. Jun. 4, 2014), ECF No. 660 (rejecting Mississippi Attorney General’s argument that state action should not be centralized with actions brought by individuals).

² Moreover, under Panel Rule 2.1(d), the pendency of a conditional transfer order does not limit the pretrial jurisdiction of the court in which the subject action is pending. Between the date a remand motion is filed and the date that transfer of the action to the MDL is finalized, a court generally has adequate time to rule on a remand motion if it chooses to do so.

-3-

IT IS THEREFORE ORDERED that the action listed on Schedule A is transferred to the Northern District of California and, with the consent of that court, assigned to the Honorable Vince Chhabria for inclusion in the coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION



Sarah S. Vance
Chair

Marjorie O. Rendell
R. David Proctor

Lewis A. Kaplan
Catherine D. Perry

**IN RE: FACEBOOK, INC., CONSUMER
PRIVACY USER PROFILE LITIGATION**

MDL No. 2843

SCHEDULE A

Northern District of Illinois

PEOPLE OF THE STATE OF ILLINOIS, EX REL. KIMBERLY M. FOXX v.
FACEBOOK, INC., C.A. No. 1:18-02667